91-882

No. ____

Supreme Court, U.S.
FILED
NOV 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE E. LEWY, *et al.*,
Petitioners,

V.

VIRGINIA DEPARTMENT OF TAXATION

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the provisions of the public Salary Act of 1939, codified as 4 USC 111, become part of the supreme law of the land in accordance with the second paragraph of Article VI and therefore binding on state courts when it was enacted pursuant to the provisions of Section 7 of Article I of the Constitution of the United States, or were they without legal effect and not binding on the states until passed on and applied as constitutionally valid by this court in *Davis* v. *Michigan Department of Treasury,* 489 U.S. 803, (1989).?

2. Can the decision of this Court in *Davis* v. *Michigan Department of Treasury,* 489 U.S. 803, (1989) be properly held to have only prospective effect on the basis of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), given this Court's decision in *James B. Beam Distilling Co.* v. *Georgia, et al,* 501 U.S., 111 S.Ct., 2439, 1991?

3. Can any court choose to give only prospective effect to a decision of this Court in reliance on *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1989), when this Court has not itself so limited the effect of that decision?

PARTIES TO THE PROCEEDING

The petitioners are the following twenty-eight persons receiving federal retirement benefits, civil or military or both, who paid to the Commonwealth the income taxes levied by it on those benefits:

Lawrence E. Lewy and Miriam Lewy
Eugene A. Bennett
Ralph J. Broberg and Rose Broberg
Gerald M. Boatwright and Carol Boatwright
Robert V. Brown and Nancy L. Brown
Donald L. Burt and Lydia Burt
Claude B. Cross and Alta Rae Cross
Charles L. Gibb and Isabelle C. Gibb
Franklin P. Michels and Elizabeth M. Michels
Joseph E. Mazur and Barbara I. Mazur
Paul N. Pfeiffer and Jean Z. Pfeiffer
Merritt Ruhlen and Florence E. Ruhlen
Donald L. Sallee and Myra N. Sallee
Robert R. Valdez and Doris Mae Valdez
Walter G. Walker, Jr.

The Virginia Department of Taxation was the defendant below.

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PETITION FOR A WRIT OF CERTIORARI

Lawrance Lewy and other named petitioners receiving federal civil and/or military retirement benefits petition this Court for a Writ of Certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Harper App. A, at 1a-5a) is as yet unreported. This Court's order remanding this matter to the Supreme Court of Virginia (No. 90-1685, June 20, 1991, Harper App. B at 6a) is reported at 111 S.Ct. 2883. The prior decision of the Supreme Court of Virginia (Harper App. C at 7a-17a) is reported at 401 S.E.2d 868. The decision of the trial court, the Circuit Court for the City of Alexandria (Harper App. D at 18a-21a) is unpublished.

JURISDICTION

The Supreme Court of Virginia issued its opinion on remand from this Court affirming its denial of petitioners' entitlement to tax refunds on November 8, 1991. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATEMENT

In *Davis* V. *Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court held that 4 U.S.C. Section 111 prohibits States from taxing federal retirement benefits while exempting their own such payments from taxation. The Commonwealth of Virginia, like Michigan and approximately twenty other states, exempted its own retirement benefits from taxation while taxing those paid by the federal government. See Code of Virginia 58.1-322(c) (3) (1984). Petitioners are retired federal employees, some receiving both civil service and military retirement pay and some receiving one or the other. The petitioners have paid the Commonwealth the income tax prescribed by law.

Following this Court's decision in *Davis*, supra, some petitioners filed tax refund actions in various circuit courts in Virginia. These actions were consolidated before the Circuit Court for the City of Alexandria. Refunds were claimed for tax years 1985, 1986, 1987 and 1988.

Under Virginia law, taxpayers are entitled to seek refunds of taxes that have been "erroneously or improperly assessed." Code of Virginia 58.1-1825 (1985). Virginia law contains no "protest" requirement as a prerequisite for tax refund claims.

The Circuit Court for the City of Alexandria denied petitioners' refund claims based upon its view that this Court's decision in *Davis* was to be applied only prospectively pursuant to the *Chevron* analysis. Petitioners appealed to the Supreme Court of Virginia, which affirmed the trial court's

analysis and holding. Harper App. C at 7a-17a). This Court granted the petitioners a writ of certiorari and remanded the case to the court below, directing it to reconsider its decision in light of *James B. Beam Distilling Co.* V. *Georgia*, 111 S.Ct. 2439 (1991). After reconsideration on remand the Supreme Court of Virginia affirmed its prior decision in all respects. The petitioners here submit their second petition for certiorari, seeking a reversal of Virginia's wrongful denial of the remedy they are entitled to on the basis of 4 USC 111 and this Court's decision in *Davis*.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 7.

Article VI.

Amendment XIV provides, in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

REASONS FOR GRANTING THE PETITION

1. Applying the provisions of the Public Salary Act of 1939, codified as 4 USC 111, this Court in *Davis* V. *Michigan Department of Treasury*, 489 U.S. 803 (1989), held that it was unlawful for Michigan to levy an income tax on federal retirement income while exempting from such taxation its own retirement benefits. Over twenty states had similar schemes of taxation. The result has been litigation in the various States with varying results and confusion. *Davis* has been applied in some courts and disregarded in others, depending on the particular court's view of the latitude given it by *Chevron Oil Co.* V. *Huson*, 404 U.S. 97 (1971) to find *Davis* of only prospective effect. The situation is that contemplated by Rule 10(b) of this Court. The decisions of the highest courts of Virginia and both Carolinas are in conflict with those of Missouri and Arkansas.

In this case, the Michigan and Virginia scheme of taxation could be described as members of the same family. Nevertheless the Supreme Court of Virginia twice affirming the judgment of the Circuit Court of the City of Alexandria, has ruled that the petitioners had no right to a refund of taxes paid by them on their federal retirement income during the years 1985-1988, nor, indeed, any other relief.

The Supreme Court of Virginia, like the trial court, based its decision on *Chevron Oil Co.* It ruled that this Court's decision in *Davis* had only prospective effect and that the Virginia tax was accordingly lawful before that decision. That being so, it went on to find that, before March 1989, the Virginia tax was not a taking of property without due process and that the petitioners were not entitled to a remedy under the Fourteenth Amendment or under Virginia law.

Whether another court can ignore a decision of this Court by invoking *Chevron Oil Co.* when this Court has not itself limited the effect of its decision is doubtful, and will be dealt with later. But given the plain language of Article I, Section 7, and what is not said in Article III of the Constitution, the decision of the Supreme Court of Virginia is clearly wrong.

In the opinions of the Virginia Supreme Court there is not so much as a reference to 4 U.S.C. 111 which this Court considered and applied in *Davis*. However, the question before the Virginia court was not whether it could ignore the opinion in *Davis,* but whether it could ignore the provisions of the law enacted in 1939 by the Congress pursuant to the Constitution. The answer to that question is certain.

Article I, Section 7 of the Constitution sets out the procedure for passing bills and resolutions.

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
>
> Every bill which shall have passed the House of

> Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to the house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.
>
> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

The plain meaning is that a constitutionally valid statute enacted under the procedure set out becomes a law and takes effect when passed by the Congress and signed by the President, as was done with the Public Salary Act of 1939.

The second paragraph of Article VI is the Supremacy Clause:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made,

> or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Its meaning is also clear. A law enacted by the Congress pursuant to the Constitution is part of the supreme law of the land and the judges of the state courts are bound by it despite anything in the constitution or the laws of the state to the contrary.

There is nothing in Article III to suggest that a law enacted by the Congress is to have legal effect and to become part of the supreme law of the land only when and as accepted by the judiciary. The courts may find an act of the Congress beyond its constitutional powers and therefore a nullity; but that is the extent of their power over the legislative process. If a constitutionally valid statute has been enacted pursuant to the Constitution it is law from the date of its enactment and it follows that 4 USC 111 had legal effect from the beginning of 1939 and did not take effect piecemeal only as applied by the courts, only when construed and applied in particular cases.

In *Davis* this Court was considering and giving effect to 4 USC 111. It made repeated references to the statute in its opinion. Its discussion of intergovernmental tax immunity related to the constitutionality of the provision, which it accepted, and the kind of discrimination forbidden. The Michigan tax was found unlawful as a violation of a valid act of the Congress which was part of the supreme law of the land. The Virginia courts were consequently bound by the statute, bound to enforce it and without any power to restrict its effect after its being enacted pursuant to the Constitution. What was before the Virginia court was the Public Salary Act of 1939, not the Public Salary Act of March 29, 1989, the date of the *Davis* decision.

It follows that the taxes paid by the taxpayer/plaintiffs were levied in violation of law as they claimed. The exaction of

an unlawful tax has long been recognized by this court as the taking of property without due process in violation of the Fourteenth Amendment. *McKesson* V. *Division of Alcoholic Beverages & Tobacco* 110 S.Ct. 2238 (1990) and cases cited therein.

The Virginia court found that the taxpayers could have no relief under the Virginia statute providing relief for taxes "erroneously or improperly assessed" within the meaning of Code of Virginia 58.1-125. But *McKesson* dealt with and prescribed the relief due taxpayers who are unlawfully taxed by a State. There this court ruled that such taxpayers are due a clear and certain remedy, either by way of refund or some equivalent relief.

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. At Page 2247.

Both in the trial court and in the Supreme Court of Virginia the Commonwealth pleaded poverty. That plea was heard with sympathy and was accepted as a ground, or the ground, for denying relief to the taxpayers. However, the same plea was advanced by Florida in *McKesson* and disposed of by this court in its unanimous opinion:

> We reject respondent's intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the fund. At Page 2257.

This case presents a question of basic importance: When does an act of the Congress, enacted pursuant to the Constitution, take effect and become part of the supreme law of the land. Put another way, the question is whether a state court or any court can postpone the legally effective date of such an act as it sees fit. As all the world knows, this is a government based on the principle of what is called the separation of powers. There are three branches of the government and none may intrude on the power of the others. In this case there is a constitutionally valid act of the Congress applied by this court in *Davis*. It forbade the kind of discriminatory tax imposed by Michigan, as by Virginia, and it forbade it, so to speak, from Day One.

Concurring in *American Trucking Associations* V. *Smith*, 110 S.Ct. 2323 (1990), Justice Scalia stated the traditional view that courts do not legislate. It is certain that this Court was not legislating in *Davis*. The Congress had already done that and had prohibited the kind of discrimination in which Virginia indulged itself for over forty years. But the taxpayer/plaintiffs were not estopped from calling for relief when they did. Acts of Congress do not waste away and vanish. Surely no state acquires a right to violate an act of Congress by prescription. The Supreme Court of Virginia was bound by 4 USC 111 from the date it became law, fifty years before the decision in *Davis*, and it was bound to apply it in this case under the Supremacy Clause.

To accept the position of the Virginia courts is to write into the Constitution a further step in the legislative procedure set out in Section 7 of Article I. Section 7 would then be read as providing that legislation passed by Congress and signed by the President or passed over his veto is a nullity, has no legal effect, and is binding on no one until receiving judicial ratification. Before such ratification acts of Congress passed pursuant to Section 7 would exist in a legal purgatory waiting for judicial endorsement. Having received such an endorsement, then and only then would an act of Congress become law with the effect provided by the Supremacy Clause. This is

in essence what the Supreme Court of Virginia has asserted in this case. Its decision requires correction by this Court. Such correction would end the confusion in all the litigation that has followed from *Davis*. As noted, over twenty states had taxing statutes like those of Michigan and Virginia. The cases brought by taxpayers following *Davis* in various states have led to varying and contradictory results, with relief to the taxpayers in some and with denial of relief in others. A ruling from this Court that *Chevron Oil Co.* cannot apply in a case involving the application of a valid act of the Congress would dispose of an issue present here and one likely to reappear in later cases.

2. In *Beam*, this Court reversed the Supreme Court of Georgia for having failed to give *Bacchus Imports* v. *Dias*, 468 U.S. 263, retroactive effect. Three members of this Court stated that its decisions always have retroactive effect as a matter of constitutional principles. Three stated that when a decision has been applied to a party in a suit decided by this Court, it must be applied thereafter to all parties in a like situation. The Supreme Court of Virginia was not moved to change its position.

On remand from this Court to reconsider its earlier ruling in light of this Court's decision in *Beam*, the Supreme Court of Virginia found no reason to change its earlier decision:

> The present case, however, is distinguishable from *Beam*. Although the Supreme Court in *Bacchus* applied its rule retroactively to the litigants in that case, the Court made no such ruling in *Davis*. Indeed, the issue of retroactivity was not considered by the Supreme Court in *Davis* because Michigan previously has agreed to the payment of a refund to Davis if its taxing scheme were invalidated. 489 U.S. at 817.

This claimed distinction rests on a misreading of both *Davis* and *Beam*.

In *Davis* this Court, after an analysis of 4 USC 111, enacted by the Congress in 1939, as part of the Public Salary Act of 1939, and of the constitutional principles of intergovernmental tax immunity on which the statute was based, held:

> For these reasons, we conclude that the Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The State having conceded that refund is appropriate in these circumstances, see Brief for Appellees 63, to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund. See *Iowa-Des Moines Bank* V. *Bennett*, 284 U.S. 239, 247 (1931).

This Court did not say that Davis would receive a refund as a courtesy or a gift from Michigan. What it said was that Davis was entitled to a refund. And it cited its opinion in *Iowa-Des Moines Bank* V. *Bennett* 284 U.S. 231, 247 (1931) in support of that result.

Iowa-Des Moines Bank involved a discriminatory State tax which this Court found illegal and for which it prescribed the remedy, namely, a refund of the unlawful tax. Iowa had failed to, as the Court said, set matters right by collecting the same tax from the favored State banks. The inference from the citation is that the *Davis* court regarded Davis, like the bank, entitled to a refund as a matter of legal right, without regard to Michigan's willingness or unwillingness to grant him that remedy.

Accordingly it seems clear that this Court applied to Davis the rule of law set out in its decision of his case, namely, that a state may not tax federal retirement income while exempting its own such payments from taxation. Michigan's volunteered remedy was contingent on this ruling of law and would have been worth nothing without it. It was the ruling of law that was applied to and benefitted Davis. It would follow from *Beam* that this Court's decision in *Davis* must be applied to parties, such as petitioners, who, like Davis, have been taxed in violation of 4 USC 111 since this Court held in *Beam* that:

> "It is error to refuse to apply a rule of federal law retroactively after the case (e.g. *Davis*) has already done so. We hold that its principles of equality and *stare decisis* here prevail over any claim based on a *Chevron Oil* analysis." 59 USLW 4738; 501 U.S.

3. The judgment of the Supreme Court of Virginia raises another question: Can any court limit a decision of this Court to prospective effect when this Court itself has not done so?

As this Court has stated, there is a presumption that its opinions have retroactive effect. *U.S.* V. *Security Industrial Park* 459 U.S. 79, (1982); *Robinson* V. *Neil*, 409 U.S. 505, 507-8 (1973). And as Justice Souter pointed out in his opinion in *Beam*, full retroactivity "is overwhelmingly the norm" (p. 2443), adding later that "In most decisions of this Court retroactivity both as to choice of law and remedy goes without the saying" (p. 2445). That being so, the *Davis* ruling that a discriminatory tax such as Virginia's is illegal had and was intended to have retroactive effect, nothing having been said by this Court to the contrary.

To give the Supreme Court of Virginia or any other court, carte blanche to apply or disregard the judgments of this Court is to invite confusion to the point of anarchy in the judicial process and to empty the Supremacy Clause of any substance or meaning insofar as the judgments of this Court are involved.

4. The petitioners do not see how *Chevron Oil Co.* can have any application to *Davis*, which did no more than interpret and apply a valid act of the Congress. The situation would have been different if *Davis* had involved reinterpretation of 4 U.S.C. 111 reversing an earlier decision. However, if *Chevron Oil Co.* were invoked here it would seem to petitioners that *Davis* does not meet the tests set out in *Chevron.*

The first test requires a finding that *Davis* reversed existing precedent or reached a result that could not have been foreseen. In fact *Davis* reversed no precedent of this or any

other court. And the only unforeseeable ruling claimed by the Commonwealth is that *Davis* treated federal retirement benefits as deferred payment for past services. This view was foreshadowed by *Kizas* V. *Webster* 707 F.2d, 524 (D.C. Cir. 1983), Cert. denied 464 U.S. 1042 (1984). Moreover, it has long been recognized that retirement benefits both state and federal are an intrinsic element in determining federal and state wages and salaries and are related to and measured by the length of service and wages or salaries of the recipient during active employment.

Further, as to the second *Chevron* test, *Davis* held that the Congress had forbidden the kind of discriminatory taxation in which Virginia engaged. To give that prohibition only prospective effect would not cure the mischief of Virginia's collection of illegal taxes but would only condone it. Cf *Montana National Bank of Billings* V. *Yellowstone County*, 276 U.S. 499 at (1928).

Finally, Virginia's argument that it would be inequitable to have it pay back what it unlawfully took involves an illogical result. This Court's reply to the same argument by Florida in *McKesson*, quoted above, would seem to dispose of this point. Virginia's position is in essence that the protection of the Due Process Clause of the Fourteenth Amendment diminishes in direct proportion to the amount of property wrongfully taken. Virginia would be, presumably, under a duty to restore a taking of $300, but would be free to keep an illegal taking of $300,000,000 or more as in this case. Such a reading would encourage grand, rather than petty, wrongful taking of property without due process.

CONCLUSION

For the reasons stated above, the petitioners ask that a writ of certiorari to the Supreme Court of Virginia be granted.

Respectfully submitted,

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APPENDIX

1. Article I, Section 7:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
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> Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to the house in which it shall have originated, who shall enter the objectioins at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.
>
> Every order, resolution, or vote o which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

2. Article VI reads in pertinent part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

3. Amendment XIV reads in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

(2)

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court of Virginia decided a federal question when it determined that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should not be applied retroactively. As an alternative holding, the Virginia Supreme Court decided as a matter of state law that the state tax refund remedy sought by these Petitioners was unavailable. Petitioners do not argue that this alternative state law holding was in any way inconsistent with, or should have been overridden by, principles of federal law. The question for decision at this stage of the case, therefore, is whether the state law basis for the judgment below presents an adequate and independent state law ground that, under accepted principles, precludes the exercise of jurisdiction by this Court to review the federal question presented by the Petition for Certiorari. This question is identical to the one presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No. 91-794 (Petition for Writ of Certiorari filed November 15, 1991), a companion case decided by the Supreme Court of Virginia along with Petitioners' action here.

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STATEMENT OF THE CASE

This case raises the same issues presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No. 91-794 (Petition for Writ of Certiorari filed November 15, 1991) ("*Harper*"), a companion case decided by the Supreme Court of Virginia along with Petitioners' action here. The question in these cases is whether the Commonwealth of Virginia is obligated under state or federal law to repay to the Petitioners and other similarly situated claimants tax refunds in excess of $440 million. The federal component of the Petitioners' claim is based on *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*").

In a May, 1989 Complaint and a December, 1989 Amended Complaint, Petitioners, like Petitioners in *Harper*, filed suits in state court against the Virginia Department of Taxation (hereafter "Commonwealth"), seeking refunds for state income taxes paid on their federal pension benefits for the taxable years 1985, 1986, 1987 and 1988. Contrary to Petitioners' statement (Petition for Writ of Certiorari at ii and 2), it is not clear that all tax liabilities have been paid because not all Petitioners have filed tax returns for 1988.

The suits were filed under Va. Code. Ann. § 58.1-1826 (1991), which provides that "[i]f the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order [refunds]." The Petitioners' claim was that *Davis* applied retroactively to the state taxes collected in the years in question, and that the taxes were "erroneously and improperly assessed" under this provision of state law. Therefore, the case presented a situation where a state remedy was being sought to enforce a federal right.

The state trial court on cross motions for summary judgment on the issue of liability denied Petitioners relief, and the Supreme Court of Virginia affirmed.[1] In an opinion published at 241 Va. 232, 401 S.E.2d 868 (1991), the Virginia Supreme Court held two things: (1) that no federal right had been established; and (2) that in any event the state remedy was not available on the facts presented.

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[1] Because summary judgment was granted to the Commonwealth, no evidence has been taken on the proper calculation of any refund.

The Petitioners sought certiorari in this Court from the Virginia Supreme Court's original decision on the ground, among others, that the Virginia Supreme Court was in error in applying the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron*"), to determine whether *Davis* should be given retroactive application. At the time that petition was filed, argument had been heard and decision was pending in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*"), which presented an analogous issue. After the decision in *Beam*, this Court followed its normal practice of granting certiorari in this case, vacating the Virginia Supreme Court decision, and remanding for further consideration in light of that decision.

The Supreme Court of Virginia has now reconsidered its former decision, found the holding in *Beam* inapplicable and reaffirmed its former decision "in all respects." *Harper* Petition for Certiorari, App. A at 5a. It therefore reconsidered and reaffirmed its position that: (1) no federal right had been established; and (2) in any event the state remedy sought by the Petitioners was not available on the facts presented. The Petitioners now seek certiorari from that reconsideration.

The grounds asserted by Petitioners for invoking certiorari in this case, with the exceptions to be discussed below, are nearly identical to those offered by Petitioners in *Harper*. Respondent already has filed its opposition to the Petition for a Writ of Certiorari in *Harper* and has set forth the reasons for denying that writ. The same arguments apply equally in this case and need not be asserted again here.

ADDITIONAL REASONS FOR DENYING THE WRIT

In addition to the grounds asserted by Petitioners in *Harper*, the *Lewy* Petitioners emphasize a constitutional argument that they did not raise in the trial court below, thus precluding review by the Supreme Court of Virginia. For that reason, this issue was not considered by the Supreme Court of Virginia and is not properly before this Court.

The *Lewy* Petitioners argue that *Davis* was not a constitutional decision, but merely construed a federal statute – the Public Salary Tax Act (4 U.S.C. § 111) – and contend that pursuant to the Supremacy Clause and Article I, Section 7 of the United States Constitution, the Virginia courts were "bound by the statute." Petition for Writ of Certiorari at 6. Petitioners did not raise this issue in the trial court below, and it is clear that the Virginia Supreme Court did not address this issue in either of its opinions. Thus, the issue was not "pressed or passed upon below." *Illinois v. Gates*, 462 U.S. 213, 222 (1983). Accordingly, it is not an appropriate issue upon which this Court should premise a grant of a writ of certiorari.

Moreover, on a substantive level, Petitioners' argument is devoid of merit for two reasons. First, even assuming that 4 U.S.C. § 111 created some "right" in the Petitioners, the statute itself prescribes no remedy whatsoever for an alleged violation of that right. It is silent on the subject, and there is no evidence that Congress intended to impose upon the states a retrospective monetary liability of extraordinary magnitude. In the face of this Congressional silence, any remedy for an alleged violation of 4 U.S.C. § 111, in accordance with well-

settled principles of federalism, must be found in state law, and that is precisely how the Virginia Supreme Court decided this case.

Second, Petitioners ignore the plain language of *Davis* itself that "the dispositive question in this case is whether the tax imposed on appellant is barred by the doctrine of intergovernmental tax immunity." 489 U.S. at 814. The rationale of *Davis* was that it did not matter whether 4 U.S.C. § 111 "provide[d] an independent basis for finding immunity or merely preserve[d] the traditional constitutional prohibition against discriminatory taxes. . . . " *Id.* "In either case," this Court continued, "the scope of the immunity" claimed by the appellants "is to be determined by reference to the constitutional doctrine." Thus, the federal issue raised by Petitioners' state court action turns not on the construction of a statute, but on whether a constitutional decision of this Court applies retroactively to taxes assessed by the Commonwealth before the date of that decision.

Petitioners also erroneously state that the issue of prospectivity of new decisions does not apply to decisions construing Congressional statutes. This argument ignores this Court's own decisions expanding the construction of Title VII of the Civil Rights Act, and then providing for prospective-only application of its new interpretation when that interpretation would impose a monetary liability on the states of extraordinary magnitude. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1095, 1105-07 (1983) (Powell, Jr. concurring).

In sum, there is nothing about this case which implicates Article I, Section 7 of the Constitution or the "legislative procedures" set out in that section, and Petitioners' argument is completely unfounded.

Finally, another argument now being advanced to this Court, which had not been argued to or decided by any court in the proceedings below, is the contention that the Virginia personal income tax "piggybacks" upon the federal scheme of taxation and is, therefore, subject to a "host" of potentially unanticipated events. This description of the relationship between Virginia and federal personal income tax provisions is a deceptive mischaracterization. While Virginia does incorporate by reference terminology from the federal income tax law, *see* Va. Code § 58.1-301, and also uses federal adjusted gross income as the starting point for the calculation of Virginia personal income tax, *see* Va. Code § 58.1-322, there are numerous statutory modifications to federal adjusted gross income required before computing Virginia taxable income. *See* Va. Code § 58.1-322(B) and (C). Revisions to the Internal Revenue Code, and rules and regulations promulgated thereunder, are continually monitored by state officials, and the Virginia General Assembly routinely passes corrective legislation when it does not wish to conform with federal changes to adjusted gross income.[2]

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[2] For example, pursuant to the Internal Revenue Code of 1986, taxpayers were allowed a deduction for one-half of self-employment taxes. This deduction, effective for taxable years beginning after December 31, 1989, is applied in computing

(Continued on following page)

More importantly, the unforeseeability which the Petitioners suggest is everpresent cannot be equated to any uncertainty which may arise from Virginia's conformity with certain federal income tax provisions. An item of income may, or may not, be includable in adjusted gross income, and there is a continuing possibility that a given taxpayer may realize less income in one year than in a previous one. Thus, adjusted gross income and refund requests are always unforeseeable.[3] The important point to be made here is that Virginia has not expressly or impliedly rendered its tax scheme subject to extraordinary, unanticipated events. The typical, individual federal or state refund claim, whether based upon omitted items, mathematical errors, or otherwise, by its very nature is "unanticipated" by the taxing authority. This element of unforeseeability, inherent in the administration of any tax, has no relevance to this case in which the entire subject matter of a longstanding tax policy affecting hundreds of thousands of taxpayers has been suddenly and unexpectedly declared invalid.

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federal adjusted gross income. The Virginia General Assembly amended Va. Code § 58.1-322, effective for taxable years beginning on or after January 1, 1990, to require that the deduction be added back to federal adjusted gross income for Virginia tax purposes. *See* Va. Code § 58.1-322(B) (8).

[3] Pursuant to Va. Code § 58.1-460 *et seq.*, and 58.1-490 *et seq.*, withholding and/or estimated tax payments are required. Until returns are filed and refunds requested, taxing authorities have no idea whether an individual has overpaid income taxes.

CONCLUSION

For the foregoing reasons and for the reasons explained in our brief in opposition to the Petition for Certiorari in *Harper*, the Petition for a Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

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